Public Prosecutor v Tan Lee Kok

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO MRRJ-A-05-99 OF 1995
SHAIK DAUD, ABU MANSOR AND HAIDAR JJCA
26 FEBRUARY 1998

Criminal Procedure *— Forfeiture — Dangerous drugs — Procedure in proceedings where claims to seized property were referred to sessions court — Whether Public Prosecutor required to make an application to the sessions court — Whether for claims under s 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988, the court is required to adopt the procedures under s 8 — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 8 & 32*

The sessions court had ordered that the property seized by the police under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') to be forfeited. On appeal, the High Court ordered the release of the property seized. The judge was of the view that since the provisions of s 32 of the Act are unclear as to the procedure to be adopted by the Public Prosecutor in an application under that section in the sessions court, the procedure contained in s 8 of the Act for applications to the High Court should have been adopted. Since this was not done, the court held that forfeiture ought not to be ordered as it violated art 13(1) of the Federal Constitution. The Public Prosecutor appealed.

Held, allowing the appeal:

Reading the Act as a whole, once property has been seized, the scheme of the Act provides a two-pronged method or procedure for such seized property to be forfeited or returned. If the Public Prosecutor requires the said property to be forfeited, without waiting for anyone to make a claim, he could proceed by making the application under s 8 of the Act. It is only under this section that a Public Prosecutor is required to make an application. It is clear from the provision of s 32 that there is no necessity for the Public Prosecutor to make such an application for forfeiture as sub-s (1) provides that if no claim is made within three months by anyone that he is lawfully entitled to such property, the 'property shall become forfeited immediately upon the expiration of the said period of three months'.

If within the three months from the date of the seizure a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within 14 days after the expiry of the three months to refer such claim to the sessions court for its decision (s 32(2)). Unlike the provisions under s 8, no application need be made by anyone in the sessions court. Section 32 merely places the burden to refer or forward the claim to the sessions court. Therefore, the proceedings under ss 8 and 32 of the Act are separate and distinct. Each section stands on its own and there is no need to allude to the procedures under s 8 for claims under s 32 of the Act.

Accordingly, the judge erred in coming to the conclusion that the procedure in s 32 of the Act is unclear and that for claims under s 32, the court is required to adopt the procedures under s 8 (see pp 70E–G and 71C–I).

Obiter:

The Act does not provide for a specific manner or a specific format for a reference under s 32 to be made. In view of that, a simple letter to that effect from the Public Prosecutor, or his deputy, would suffice. There is no necessity to file any affidavit. It is incumbent on the Public Prosecutor, or his deputy, to make the reference as the law makes no mention any other person or body to make such a reference. In the present case, however, no such reference was in fact made by the Public Prosecutor or his deputy. What was filed was an affidavit by the police which was sent with a covering letter signed by a deputy public prosecutor. This was not in accordance with the provisions of the law. However, as the matter was before the sessions court, and that court has jurisdiction to hear the reference, such a failure had not vitiated the reference, as the court had taken cognizance of the reference and acted upon it by issuing a summons to the claimant to attend court to be examined. It is trite law that once a matter is before the court, and the court has jurisdiction the hear the matter, the court ought not to concern itself with the manner in which it comes before the court (see pp 71I and 72A–D).

[**Bahasa Malaysia summary**

Mahkamah sesyen telah memerintahkan supaya harta yang disita oleh pihak polis di bawah s 25 Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta tersebut') dilucuthakkan. Atas rayuan, Mahkamah Tinggi memerintahkan supaya harta yang disita dilepaskan. Hakim berpandangan bahawa oleh kerana peruntukan s 32 Akta tersebut tidak jelas mengenai prosedur untuk diterimapakai oleh Pendakwa Raya dalam suatu permohonan di bawah seksyen tersebut di mahkamah sesyen, prosedur yang termaktub dalam s 8 Akta tersebut untuk permohonan kepada Mahkamah Tinggi sepatutnya telah diterimapakai. Memandangkan ini tidak dilakukan, mahkamah memutuskan bahawa perlucuthakan tidak patut diperintahkan kerana ia melanggar perkara 13(1) Perlembagaan Persekutuan. Pendakwa Raya merayu.

Diputuskan, membenarkan rayuan:

Membaca Akta tersebut secara keseluruhan, sebaik sahaja harta telah disita, skim Akta tersebut memperuntukkan cara atau prosedur dua penjuru supaya harta yang disita boleh dilucuthakkan atau dikembalikan. Sekiranya Pendakwa Raya menghendaki harta tersebut dilucuthakkan, tanpa menunggu sesiapa untuk membuat tuntutan, beliau boleh terus membuat permohonan di bawah s 8 Akta tersebut.

Hanya di bawah seksyen inilah Pendakwa Raya perlu membuat permohonan. Adalah jelas daripada peruntukan s 32 bahawa tiada keperluan untuk Pendakwa Raya membuat permohonan demikian untuk perlucuthakan kerana sub-s (1) memperuntukkan bahawa sekiranya tiada tuntutan dibuat dalam tempoh tiga bulan oleh sesiapa bahawa dia berhak di bawah undang-undang kepada harta itu, 'harta haruslah dilucuthakkan dengan segera selepas tamatnya tempoh tiga bulan tersebut'.

Sekiranya dalam tempoh tiga bulan dari tarikh penyitaan satu tuntutan bertulis dibuat oleh sesiapa seperti mana dalam rayuan ini, Pendakwa Raya perlu merujuk tuntutan demikian dalam tempoh 14 hari selepas tamatnya tiga bulan kepada mahkamah sesyen untuk keputusannya (s 32(2)). Berbeza dengan peruntukan dalam s 8, tiada permohonan perlu dibuat oleh sesiapa di mahkamah sesyen. Seksyen 32 cuma meletak beban untuk merujuk atau menghantar tuntutan kepada mahkamah sesyen. Maka, prosiding di bawah ss 8 dan 32 Akta tersebut adalah berasingan dan berlainan. Setiap seksyen berdiri dengan sendirinya dan tiada keperluan untuk merujuk kepada prosedur-prosedur di bawah s 8 untuk tuntutan di bawah s 32 Akta tersebut. Oleh itu, hakim terkhilaf dalam mencapai kesimpulan bahawa prosedur dalam s 32 Akta tersebut adalah tidak jelas dan bahawa untuk tuntutan di bawah s 32, mahkamah perlu menerimapakai prosedur-prosedur di bawah s 8 (lihat ms 70E–G dan 71C–I).

Obiter:

Akta tersebut tidak memperuntukkan cara atau format yang spesifik untuk membuat rujukan di bawah s 32. Dengan mengambil kira ini, sepucuk surat yang biasa daripada Pendakwa Raya, atau timbalannya, akan memadai. Tiada keperluan untuk memfailkan apa-apa afidavit. Ia merupakan kewajipan Pendakwa Raya, atau timbalannya, untuk membuat rujukan itu kerana undang-undang tidak menyebut tentang sesiapa yang lain atau badan lain untuk membuat rujukan begitu. Namun demikian, dalam kes ini, tiada rujukan begitu pada hakikatnya telah dibuat oleh Pendakwa Raya atau timbalannya. Apa yang difailkan ialah satu afidavit oleh pihak polis yang dihantar dengan sepucuk surat iringan yang ditandatangani oleh seorang timbalan pendakwa raya. Ini tidak mematuhi peruntukan undang-undang. Namun demikian, oleh kerana perkara itu di hadapan mahkamah sesyen, dan mahkamah itu mempunyai bidang kuasa untuk mendengar rujukan, kegagalan demikian tidak menjadikan rujukan tidak sah, kerana mahkamah telah mengambil tahu tentang rujukan dan bertindak atasnya dengan mengeluarkan saman kepada pihak menuntut supaya menghadiri mahkamah untuk disoal-tanya. Adalah undang-undang mantap bahawa sebaik sahaja sesuatu perkara di hadapan mahkamah, dan mahkamah mempunyai bidang kuasa untuk mendengar perkara itu, mahkamah tidak patut bimbangkan cara bagaimana ia dibawa di hadapan mahkamah (lihat ms 71I dan 72A–D).]

Notes

For cases on forfeiture, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1275–1352.

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2, 8, 9, 25, 32
Evidence Act 1950 s 101
Federal Constitution art 13(1)

Appeal from: Criminal Appeal No 52–9 of 1995 (High Court, Taiping)

Mohd Yusof bin Hj Zainal Abiden (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): This is an appeal against the decision of the Taiping High Court which had ordered the release of property seized by the police under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The Taiping Sessions Court had earlier ordered the seized property to be forfeited.

This appeal, together with MRRJ A–05–98–95, revolves around the interpretation of s 32 of the Act. The learned judge was of the view that since the provisions of s 32 of the Act are unclear as to the procedure to be adopted by the Public Prosecutor in application under that section in the sessions court, the procedure contained in s 8 of the Act for applications to the High Court should have been adopted. Since this was not done, the court held that forfeiture ought not to be ordered as it violated art 13(1) of the Constitution. This article provides that no person shall be deprived of property save in accordance with law.

We find it necessary to reproduce the provisions of ss 32 and 8 of the Act.

> 32 (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —
>
> (a) no prosecution for any offence under any law is instituted with regard to such property;
>
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
>
> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,
>
> within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.
>
> (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any

person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after expiry of the said period of three months, *refer such claim* to a Sessions Court for its decision.

(3) The Sessions Court to which *a claim is referred* under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter. (Emphasis added.)

Now s 8 provides:

8 (1) If the Public Prosecutor has reason to believe that any person is a liable person *he may apply* ex parte to the High Court for an order of forfeiture of all the properties of which such person is a holder and which the Public Prosecutor has reason to believe are illegal properties.

(2) *The application*, supported by an affidavit or affidavits, shall —
(a) identify the liable person to be proceeded against, state his address of residence or business, if known, and other relevant particulars, which are known;
(b) state the grounds on which he is a liable person;
(c) identify the properties to be forfeited, set out their estimated value, and, if known, their location; and
(d) state any other matter, circumstance or information which, in the opinion of the Public Prosecutor, is relevant to the application.

(3) An application under subsection (1) shall be made by filing the same with the Registrar of the High Court who shall thereupon immediately fix a date for its hearing before the High Court.

(4) ... (Subsection (4) is not relevant for the purpose of this appeal). (Emphasis added.)

Section 9 of the Act then provides what the High Court should do once it is satisfied that the application by the Public Prosecutor is made in accordance with the requirements of s 8. The court shall then issue a notice upon the liable person to show cause why all or any of the properties identified in s 8(2)(c), should not be forfeited.

As can be seen, the two sections — ss 8 and 32 — are distinct and separate provisions from each other. Each section could and should stand on its own. On our reading of the learned judge's grounds of judgment, we feel that the learned judge fell into error when he was referring to the application by the Public Prosecutor under s 32 of the Act. No where in s 32 of the Act is mentioned any application by the Public Prosecutor. If there is any application at all, it would be one under s 32(1)(c) by any person claiming to be lawfully entitled to such seized property. When such a claim is made, the Public Prosecutor is never required to make an application to the sessions court. The Public Prosecutor is merely required to refer such application to the sessions court. Furthermore, s 32 of the Act refers to properties already seized by the police under s 25 of the Act, as the case in the instant appeal. By sub-s (1)(b) of s 32, it also refers to properties having been seized but no proceedings are commenced by the Public Prosecutor under Part III, and proceedings under s 8 comes under Part III of the Act. Section 25 empowers a senior police officer to seize any movable property suspected to be the subject matter of an offence under the Act, or which has been used for the commission of that offence, or illegal property. Section 2 of the Act provides an extensive definition of illegal property.

On our reading of the Act as a whole, we are of the view that once property has been seized, the scheme of the Act provides a two-pronged method or procedure for such seized property to be forfeited or returned. If the Public Prosecutor requires the said property to be forfeited, without waiting for anyone to make a claim, he could proceed by making the elaborate application under s 8 of the Act. It is only under this section that a Public Prosecutor is required to make an application. Section 32 of the Act makes no such provision. In fact, it is clear from the provision of s 32 that there is no necessity for the Public Prosecutor to make such an application for forfeiture, as sub-s (1) provides that if no claim is made within three months by anyone that he is lawfully entitled to such property, the 'property shall become forfeited immediately upon the expiration of the said period of three months'. It is clear that if no claim is made within three months, forfeiture is in fact automatic. Therefore, we hold that under s 32 there is no provision for the Public Prosecutor to make or file an application for forfeiture. Another distinction is that s 8 refers to holders of properties of a liable person and a liable person is defined in s 2 of the Act, whereas s 32 does not confine to holders of properties of a liable person but refers to any property which has been seized.

Looking at both the provision of ss 8 and 32, it can be seen that the law places a high burden on the Public Prosecutor if he requires the court to forfeit properties held by a liable person. Such an application can only be made in the High Court. He has first to make an ex parte application (s 8(1)) supported by affidavit identifying the liable person, the grounds on which that person, identifying the property or properties to be forfeited and give any other relevant information (s 8(2)). Such an application shall be filed with the Registrar of the High Court (s 8(3)). Section 9 then provides for the ex parte application to be heard and upon the High Court

A being satisfied that all the requirements of s 8 has been fulfilled, the court would then issue a show cause letter to the liable person to show cause why all or any of the properties identified should not be forfeited.

As for s 32 of the Act, it applies to any property seized, such as under s 25 of the Act. The seizure in the present case is under s 25 of the Act.
B Having seized such properties, and if no prosecution is instituted (s 32(1)(a)) or if no proceedings commenced by the Public Prosecutor, such as under s 8 (s 32(1)(b)) and no claim is made by anyone within a period of three months (s 32(1)(c)), then the seized property or properties stands forfeited after the expiration of the said three months.

C If within the three months from the date of the seizure a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within 14 days after the expiry of the three months to refer such claim to the sessions court for its decision (s 32(2)). Unlike the provisions under s 8, no application need be made by anyone in the sessions court, nor is the sessions court required to be satisfied that any
D provisions has been complied with except perhaps that the claim is made in writing within three months from the date of the seizure. Upon being referred to under s 32(2), then pursuant to s 32(3), the sessions court is required to issue a summons to the person claiming and shall proceed to the examination of the matter. From this it can be seen the law does not place the burden on the Public Prosecutor to satisfy the court that the
E seizure was proper, or that the property ought to be forfeited; on the contrary, the law places a burden on the person who made the claim to answer the summons. Section 32(3) places the burden upon the person making the claim 'upon proof that he is lawfully entitled thereto'. Section 32, therefore, places no burden on the Public Prosecutor to proof anything. It
F merely places the burden to refer the claim to the sessions court. Therefore, under s 32, the role of the Public Prosecutor is merely to forward the claim and as has been well put by the Deputy Public Prosecutor, the role of the Public Prosecutor is that of a 'forwarding agent'. In fact, the procedure both in ss 8 and 32 is consistent with s 101 of the Evidence Act 1950, which provides that the burden of proof is on the person who asserts a
G thing. Under s 8, since it is the Public Prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, whereas under s 32, the burden would be on the claimant who asserts that he is lawfully entitled to the property.

Therefore, the proceedings under ss 8 and 32 of the Act are separate
H and distinct. Each section stands on its own and there is no need to allude to the procedures under s 8 for claims under s 32 of the Act.

We are, therefore, of the view that the learned judge erred in coming to the conclusion that the procedure in s 32 of the Act is unclear and that for claims under s 32, the court is required to adopt the procedures under
I s 8.

Before leaving the matter, we would like to touch on the procedure to be adopted for a reference under s 32(2) of the Act. The Act does not provide for a specific manner or a specific format for such reference to be

made. In view of that, we are of the view that a simple letter to that effect from the Public Prosecutor or his deputy, would suffice. There is no necessity to file any affidavit. We would like to emphasize that it is incumbent on the Public Prosecutor, or his deputy, to make the reference as the law makes no mention any other person or body to make such a reference. In the present case, however, we noticed from the records of appeal that no such reference was in fact made by the Public Prosecutor or his deputy. What was filed was an affidavit by the police. How this affidavit was forwarded to the court was not recorded but the learned deputy public prosecutor, from the bar, informed us that it was sent with a covering letter signed by a deputy public prosecutor. We are of the view that this is not in accordance with the provisions of the law. Be that as it may, as the matter was before the sessions court, and that court has jurisdiction to hear the reference, such a failure has not vitiated the reference, as the court had taken cognizance of the reference and acted upon it by issuing a summons to the claimant to attend court to be examined. It is trite law that once a matter is before the court, and the court has jurisdiction the hear the matter, the court ought not to concern itself with the manner in which it comes before the court.

For the above reasons, we allow the appeal and set aside the order of the learned judge. As the prosecution failed to apply for a stay of execution of the learned judge's order, we are informed that the properties ordered by the High Court to be released to the respondent has dissipated and also that the respondent in Appeal No A–05–98–95 has passed away, we see no purpose to order the properties to be returned. Therefore, we make no order on the properties.

Appeal allowed.

Reported by Jafisah Jaafar